



Supreme Court, U.S.

FILED

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No. _____

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF COLORADO,

Petitioner,

vs.

ROBIN AULD,

Respondent.

Petition For Writ Of Certiorari
On Certiorari To The Colorado Court Of Appeals
Court Of Appeals No. 89CA0995

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court violated the doctrine of separation of powers by dismissing the prosecution of an attorney allegedly engaged in criminal activity on the basis that the government filed a fictitious court case as a part of its undercover investigation, absent any finding that the attorney's constitutional rights were violated?

2. Whether the United States Constitution required dismissal of criminal charges on the grounds that the government's filing of a fictitious court case as a part of its undercover investigation constituted outrageous governmental misconduct?

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No. _____

—◆—
In The
Supreme Court of the United States
October Term, 1991
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THE STATE OF COLORADO,
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vs.

ROBIN AULD,
Respondent.

—◆—
**Petition For Writ Of Certiorari
On Certiorari To The Colorado Court Of Appeals
Court Of Appeals No. 89CA0995**
—◆—

PETITION FOR WRIT OF CERTIORARI
—◆—

OPINION BELOW

The Colorado Court of Appeals affirmed the state district court's pre-trial dismissal of a criminal prosecution against the respondent, attorney Robin Auld, on charges of Theft Receiving and Possession of a Dangerous Weapon (Colorado Stat., Sections 18-4-410 and 18-12-102 1986). The Colorado Court of Appeals found that the government's filing of a fictitious court case in order to place an undercover officer in the position of the defendant's "client" impermissibly involved the judiciary as an unwitting accomplice to the government's undercover operations and constituted outrageous governmental

misconduct violative of the Due Process Clause. This opinion is published as *People v. Auld*, 815 P. 2d 956 (Colo. App. 1991), and is attached as Appendix A.

Petitioner then sought certiorari from the Colorado Supreme Court. Certiorari was denied on August 26, 1991, although Chief Justice Rovira stated that he would grant certiorari as to the court's finding of outrageous governmental misconduct and the issue of the doctrine of separation of powers. (See Appendix B.) The Colorado Court of Appeals then issued its mandate on September 12, 1991, affirming the lower court's judgment of dismissal. (See Appendix C.)

JURISDICTION

The Colorado Court of Appeals found that the government's conduct in filing the fictitious court case during the investigatory phase of the prosecution violated fundamental fairness and was shocking to the universal sense of justice required by the Due Process Clause, citing, as authority, *United States v. Russell*, 411 U.S. 423 (1973). The Colorado Court of Appeals did not rely upon any independent state ground for its decision, finding, instead, that the doctrine of the separation of powers had been violated when the government impermissibly involved the court as an unwitting accomplice to its investigation. The highest state court, the Colorado Supreme Court, denied the government's request for certiorari on August 26, 1991. The certiorari jurisdiction of this Court is, therefore, invoked pursuant to 28 U.S.C., Section 1257.

Additionally, the Colorado Court of Appeals has decided a federal question in a way that conflicts with the decision of another state court of last resort, and its decision involves an important question of federal law which has not been, but should be, decided by this Court. Thus, certiorari jurisdiction is also invoked pursuant to Sup. Ct. R. 10.1 (b) and (c).

CONSTITUTIONAL PROVISIONS

Article III of the United States Constitution provides in pertinent part: "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Amendment V of the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV, Section 1, of the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

FACTUAL BACKGROUND

The respondent, an attorney, was arrested on October 29, 1988, in Durango, Colorado, for possession of a fully automatic UZI machine gun which had been given to him in lieu of a fee by an undercover officer posing as his

client. The investigation of the respondent was part of a task force project called "LEADS" (Law Enforcement Against Drugs) funded by a federal grant to combat the narcotics trade in southwest Colorado. Based upon information that the respondent was either involved in the drug trade or would accept drugs in lieu of legal fees, the task force, with the advice of the district attorney for the Sixth Judicial District, decided to target the respondent.

In order to facilitate the plan, an undercover officer who had been making drug purchases for the task force was arrested and placed in jail on a misdemeanor charge of possession of marijuana. A fictitious affidavit and other papers were filed with the county court with the knowledge and consent of the district attorney. The undercover officer subsequently sought the services of the respondent.

The undercover officer offered to pay the respondent for his legal services by giving him drugs. The respondent declined that offer but indicated that he would accept a gun at a "blackmarket price" in lieu of his fee. After a series of negotiations, the respondent agreed to accept a reportedly stolen, fully automatic UZI machine gun as payment for his fee. This transaction, which occurred in the respondent's office, was recorded by the undercover officer and monitored by a surveillance officer. Shortly after receiving the weapon, the respondent was arrested.

The district attorney removed himself from the case prior to the filing of any charges against the respondent. A special prosecutor, appointed by the court, decided to

file felony charges of Theft Receiving and Possession of an Illegal Weapon against the respondent.

STATE COURT PROCEEDINGS

In pre-trial motions, the respondent asked that the case against him be dismissed. The trial court granted the motion to dismiss based upon the government's filing of fictitious documents with the county court, as well as the false statements made in open court by the undercover officer prior to the respondent's arrest. After a lengthy hearing, the trial court concluded that the government had impugned the integrity of the courts by covertly involving a court in its undercover operation.

The Colorado Court of Appeals concurred with the trial court, rejecting the government's argument that the trial court's pre-trial dismissal of the charges violated the doctrine of separation of powers. The Colorado Court of Appeals stated that it was the government that had violated the separation of powers doctrine by involving a court in its investigation. Neither the trial court, in its written opinion dismissing the case, nor the Colorado Court of Appeals, in its published opinion, articulated any prejudice to the defendant's rights created by the government's actions.

In separate actions, both the respondent and the district attorney for the Sixth Judicial District were disciplined by the Colorado Supreme Court. The respondent received a six-month suspension, *People v. Auld*, 788 P. 2d 1275 (Colo. 1990), and the district attorney received a public censure in a decision announced on October 21,

1991, *People v. Reichman*, Supreme Court, State of Colorado, No. 90SA485. The special prosecutor took no part in these independent actions. The special prosecutor has filed this request for certiorari review as a result of the Colorado Court of Appeals decision affirming the trial court's dismissal of the criminal case against the respondent.

REASONS FOR GRANTING THE WRIT

The state court below has set a significant precedent by construing the language¹ of *United States v. Russell*, 411 U.S. 423 (1978) to permit the dismissal of a criminal case without finding any violation of the defendant's constitutional rights.

This Court has never sanctioned the dismissal of a case solely on the grounds that the government's conduct was so outrageous as to constitute a violation of due process.² The majority of the federal circuit courts have

¹ " . . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952) . . . " *United States v. Russell*, 411 U.S. at 431-32.

² See *United States v. Russell*, 411 U.S. 423 (1978); *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Payner*, 447 U.S. 727 (1980); *United States v. Hasting*, 461 U.S. 499 (1983).

similarly held that, in the absence of a violation of the defendant's fundamental rights, the government's misconduct in the investigatory stage of a case cannot be the sole grounds for dismissal.³ In at least two instances, a state court examining the issue of the government's prosecution of fictitious cases in order to plant an undercover officer within the criminal justice system has similarly held that dismissal was not warranted.⁴

This Court has never addressed the issue of the government's use of an undercover agent within the court system itself. Such a procedure invariably involves some level of deceit, as well as the potential violation of one or more of the tenets of the Code of Professional Responsibility.

The investigation of an attorney who accepts stolen or illegal property in lieu of legal fees will almost invariably require the use of an undercover agent. It is unlikely

³ See *United States v. Dyman*, 739 F. 2d 762 (2d Cir. 1984); *United States v. Pagan*, 721 F. 2d 24 (2d Cir. 1983); *United States v. Janotti*, 673 F. 2d 578 (3rd Cir. 1982), cert. denied, 457 U.S. 1108, 102 S. Ct. 2908, 73 L. Ed. 2d 1317 (1982); *United States v. Martino*, 825 F. 2d 754 (3rd Cir. 1987); *United States v. Weisz*, 718 F. 2d 413 (D.C. Cir. 1983); *United States v. Garrett*, 716 F. 2d 257 (5th Cir. 1983); *United States v. Thoma*, 726 F. 2d 1191 (7th Cir. 1984); *United States v. Murphy*, 768 F. 2d 1518 (7th Cir. 1985), cert. denied, 106 S. Ct. 1188, 89 L. Ed. 2d 304 (1986); *United States v. Leroux*, 738 F. 2d 943 (8th Cir. 1984); *United States v. Gamble*, 737 F. 2d 853 (10th Cir. 1984); *U.S. v. Puett*, 735 F. 2d 1331 (11th Cir. 1984); *United States v. Haimowitz*, 725 F. 2d 1561 (11th Cir. 1984).

⁴ See *Nigrone v. Murtagh*, 46 App. Div. 343, 362 N.Y.S. 2d 513, (1974); *People v. Archer*, 68 App. Div. 2d 441, 417 N.Y.S. 2d 507 (1979).

that the uncorroborated testimony of a former client will ever be sufficient to sustain the government's burden of proof. The undercover agent's legitimacy as a criminal defendant cannot be established without the filing of a fictitious case with the court. Although no one is likely to find such a procedure very palatable, it is constitutionally the responsibility of the government to determine if it is necessary.

There are important policy considerations at stake in this case. When a criminal defense lawyer accepts stolen property or contraband from a client, that lawyer promotes crime. The criminal justice system should not serve to engender new criminal activity. Nor are mere disciplinary procedures sufficient to address the problem. The government should be permitted to bring to trial any individual suspected of crimes against the State, regardless of the status or position of that person.

If the Colorado Court of Appeals is permitted to dismiss a case based upon an erroneous application of the Due Process language of *Russell*, other courts may do likewise. The Court of Appeals disregarded two significant federal precedents in this area. In *United States v. Martino*, 825 F. 2d 754 (3rd Cir. 1987), the Court of Appeals for the Third Circuit reversed a District Court's decision to dismiss an indictment based upon the government's issuance of a "sham" grand jury subpoena as a part of an undercover investigation of an attorney. No attempt had been made in *Martino* to inform the supervising judge of the government's clandestine use of a fictitious subpoena. Nevertheless, the Third Circuit held that none of the defendant's constitutional rights had been compromised.

In *United States v. Murphy*, 768 F. 2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986), the Circuit Court of Appeals for the Seventh Circuit addressed the issue of alleged governmental misconduct in a federal investigation of corrupt judges in the Chicago courts. The investigation, labelled "Operation Greystone," utilized undercover agents posing as criminal defendants in fictitious cases in order to investigate allegations of bribery against certain judges, bail bondsmen, and attorneys. In addition to the filing of fictitious cases, perjured testimony was given by law enforcement officers in furtherance of the undercover operation. The Seventh Circuit Court of Appeals did not find the government's conduct to be violative of the Due Process Clause.

The Colorado Court of Appeals distinguished the *Murphy* decision by stating that the "Greylord" investigation involved pervasive corruption within the Chicago court system and that the supervising judge had been notified of the investigation. The assessment of the degree of harm created by a suspect's activity belongs not to the court but to the government. If the government determines that the illegal activity of a single individual warrants investigation, it should be able to institute an undercover operation without fear of a reassessment of that need at some future point in time by the court.

Moreover, the proposal that the government be required to notify a supervising judge of the undercover operation merely begs the question of the government's recruiting the judiciary as its investigatory arm. As the Third Circuit Court of Appeals pointed out in *Martino*, the notification of the court transforms the appearance of

the court's participation in a governmental undercover operation into actuality. *Martino*, 825 F. 2d at 761.

The government does not suggest in this petition, nor did it suggest to the court below, that the door opened by the language of *United States v. Russell*, 411 U.S. 432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), should be closed. There may certainly be some investigative activity of the government so violative of fundamental fairness that the Due Process Clause would prohibit the prosecution of the case. However, the Colorado Court of Appeals drew the line in the wrong place and, by so doing, inhibited forever legitimate government investigation into crime occurring within the judicial system. The impact of its decision applies equally to potential investigations of attorneys, judges, prosecutors, or court personnel. Any prosecutor reading the *Auld* decision will conclude that an undercover operation involving the filing of a fictitious court case is likely to violate the Due Process Clause.

CONCLUSION

It is clear that the government's activities in this case did not violate any constitutional right of the defendant. The Colorado Court of Appeals decision, therefore, upsets the delicate balance of interests embodied in this Court's applications of the exclusionary rule. In *United States v. Payner*, 447 U.S. 727 (1980), this Court cautioned against the use of a court's supervisory powers to dismiss a case, because of the dangers inherent in the exercise of "a standardless discretion." *Payner*, 447 U.S. at 733. The

Auld decision establishes a precedent of rewarding the wrongdoer for the government's violations of an ethical rule, even when there is no arguable impact of that violation upon the defendant's rights.

If it is impermissible conduct for the government to create a fictitious case, not only will attorneys, in a practical sense, be immune from prosecution for crimes committed within the context of their legal employment, but the investigation of corrupt judges and prosecutors will likewise be curtailed. Unless the decision is reversed, the *Auld* case will continue to have a chilling effect on the government's use of covert methods to investigate crime within the justice system for years to come.

Respectfully submitted,

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APPENDIX A
COLORADO COURT OF APPEALS
NO. 89CA0995

THE PEOPLE OF THE STATE)
OF COLORADO)
 Plaintiff-Appellant,)
v.)
ROBIN K. AULD,)
 Defendant-Appellee.)

Appeal from the District Court La Plata County
No. 88CR129

Honorable Richard J. Brown, Judge

DIVISION III JUDGMENT AFFIRMED
Opinion by JUDGE NEY
Metzger and Ruland, JJ., concur

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The People appeal the judgment of the district court dismissing a criminal information charging defendant, Robin K. Auld, with one count of theft by receiving and one count of possession of a dangerous weapon. We affirm.

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In 1988, La Plata County law enforcement officials obtained a federal funding grant for the conduct of undercover activities aimed at drug trafficking, a project known by the acronym LEADS. The steering committee for LEADS included the sheriff of La Plata county, the district attorney for the Sixth Judicial District, and police chiefs of various police departments within the judicial district. Based on unsubstantiated information, the LEADS Committee initiated an undercover operation targeting the defendant, who was an attorney.

A fictitious complaint was filed against a "Colton Young" in the county court. "Colton Young" was in fact the alias of an undercover agent. The fictitious complaint was drafted by the district attorney, typed by his secretary, signed by a sheriff's officer, and notarized by the wife of the district attorney.

"Colton Young" was "charged" with carrying a concealed weapon and possessing marijuana. He was brought before a county judge, advised of his rights, and questioned by the court about general information relating to his identity, status, and bond. The undercover agent made several false statements to the judge, who was unaware of his true identity, and posted a surety bond, which was sworn to under oath in front of a deputy clerk for the county court. "Colton Young" then retained the defendant to represent him in his defense. The defendant telephoned the court to determine the status of the charges against "Colton Young."

After having paid the defendant his retainer in cash, the undercover agent asked if the remainder could be

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paid by giving something in trade. The defendant immediately replied that if cocaine was being suggested, he would not accept it; however, he stated that he might be interested in a gun at "a black market price."

Under the terms of the LEADS grant, the scope of its activities was limited to drug enforcement activities; therefore, the program could no longer be used to justify further action after the defendant rejected the opportunity to take drugs in exchange for legal services. Nevertheless, the LEADS committee, through the undercover agent, presented the defendant with weapons, first as collateral for his fee, and eventually in payment of his fee. His acceptance of an Uzi semiautomatic rifle led to the charges against the defendant.

After the defendant's arrest, the district attorney and law enforcement officers discussed with him the possibility that the charges would "go away" if he provided information about a number of people, including present or former clients. The defendant refused.

In response to a pretrial motion by defendant, the charge was dismissed, and this appeal was pursued by current counsel for the People.

I.

The People assert that the trial court's dismissal of the case against the defendant violates the doctrine of separation of powers. We disagree.

The United States Supreme Court has recognized the existence of the legal defense of outrageous governmental

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conduct and has found application of a court's supervisory powers in dismissing a criminal case may be proper if the government's conduct has violated fundamental fairness and is shocking to the universal sense of justice. *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Colorado recognized the due process claim of outrageous governmental conduct in *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

In *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988), this concept was again at issue. There, the court accepted its viability, but it determined that an undercover agent's encouragement of a minor to purchase drugs and commit crimes, as well as providing a minor with illegal drugs, was not so extreme and outrageous as to amount to a denial of due process. Accordingly, the trial court's dismissal of delinquency proceedings against the minor was reversed by the supreme court.

Relying on *People in Interest of M.N.*, *supra*, the trial court here *denied* defendant's motions to dismiss that were grounded on governmental misconduct and outrageous governmental conduct which denied him due process, on targeting him without probable cause or reasonable suspicion, on failure to cease the operation when he refused drugs, and on infringement of the attorney-client relationship. However, the court granted defendant's motion to dismiss based on alleged outrageous governmental conduct that had implicated the court in law enforcement activities.

The People in effect admit that the district attorney here has perpetrated a fraud upon a court of this state by filing false documents, making false statements to a

judge, and creating a counterfeit prosecution. They further concede that as a result of the district attorney's activities, the county court was duped into playing an active part in the prosecutorial function of the executive branch. It was therefore the executive branch which initially violated the doctrine of the separation of powers.

As the trial court correctly observed:

"How far can the Executive Branch involve the Judicial Branch, whether knowingly or unknowingly, as an accomplice to its undercover operations. . . . If there is any separation of powers and any independence of the branches of the government, then it cannot be that a law enforcement officer or a district attorney decides when and to what extent the judiciary becomes involved, knowingly or unknowingly, in its undercover operations. This is particularly so when the courts are supposed to be the one arena of impartiality favoring neither the prosecution nor the defense."

We agree with this analysis and reject any invocation of the separation of powers doctrine as a basis for reversal of the trial court's ruling.

II.

The People next assert the trial court's dismissal must be reversed because the government's conduct did not prejudice the defendant. We disagree.

The People suggest that there is no Colorado case and very few cases in other jurisdictions which support dismissal for government misconduct absent a finding of

actual prejudice to the defendant. This argument incorrectly assumes that the court's dismissal was based upon the improper conduct of targeting the defendant in an investigation without reasonable suspicion or attempting to use an attorney as an informant against his clients. However, as noted above, these acts of governmental misconduct were not the basis of the dismissal.

Therefore, we are unpersuaded by the People's argument that, since no actual prejudice to the defendant by the governmental misconduct was demonstrated, the dismissal for outrageous governmental conduct cannot stand.

III.

The People further contend that the trial court erred in dismissing the charges against the defendant based upon the outrageous governmental conduct that implicated the court in the prosecution aspect of the law enforcement process. We again disagree.

Relying on the reasoning of *United States v. Omni International Corp.*, 634 F. Supp. 1414 (D. Md. 1986), the trial court exercised its supervisory power in protecting judicial integrity in the face of governmental misconduct. The trial court found, with evidentiary support, that the conduct of the district attorney, an officer of the court, and the law enforcement agencies may have violated the Colorado Criminal Code relating to perjury and false swearing.

In addition, the district attorney may very well have violated the Code of Professional Responsibility by using

perjured testimony, making false statements to the court, and by the manner in which he performed the duties of a public prosecutor. Also to be considered is ABA, *Standards for Criminal Justice*, Standard 3-2.8(a) (1980) which denotes as unprofessional conduct the intentional misrepresentation by a prosecutor of matters of fact or law to the court.

The foregoing list of potential violations, which is not intended to be exhaustive, committed by the district attorney and law enforcement agencies for the purpose of duping a court into becoming an accomplice in their law enforcement function must be condemned by this court.

Relying on *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), the People assert that even though some rules have been broken, dismissal is not warranted even if the courts have been compromised.

The People's reliance on *Murphy* is misplaced. *Murphy*, which arose out of a federal investigation of corruption in the Chicago judicial system, is readily distinguishable.

An undercover investigation of an allegedly corrupt court system necessarily implicates the court system, and the Chicago investigation was conducted under the supervision of the presiding judge. Here, there was neither a corrupt court to be investigated, nor judicial supervision of the investigative activities.

We conclude that the trial court correctly determined that the conduct of the executive branch in compromising the judicial branch, thereby making it an unknowing

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accomplice to undercover prosecution activities, was so outrageous that appropriate sanctions are required.

IV.

The People finally assert that even if sanctions are appropriate, dismissal is too severe a sanction. In response to an invitation to suggest an appropriate sanction, the People have proposed that the political process may provide the only appropriate remedy. We are unpersuaded that the sole remedy lies in the electoral process. We conclude that when the integrity of the court is compromised, as here, by overzealous prosecution, dismissal of the case is an appropriate remedy.

The judgment is affirmed.

JUDGE METZGER and JUDGE RULAND concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO

Case NO. 91SC158

Certiorari to the Colorado Court of appeals 89CA0995

La Plata County District court 88CR129

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

ROBIN K. AULD,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 26, 1991.

CHIEF JUSTICE ROVIRA would grant as to the following issues:

Whether the court of appeals erred in affirming the trial court's dismissal of the case as not violative of the doctrine of separation of powers by infringing upon the authority of the district attorney to carry out his or her

constitutionally imposed duty to enforce the criminal laws of the State of Colorado.

Whether the filing of a fictitious county court case, in order to place an undercover officer in the position of the "client" of the defendant, an attorney, and the subsequent dismissal of the case, constitute outrageous governmental misconduct under Colorado law.

[SEAL]

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APPENDIX C

Appeal from the District Court of La Plata County, Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered January 17, 1991 before Ney, Metzger and Ruland, JJ.

COURT OF APPEALS, STATE OF COLORADO
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MANDATE

Court of Appeals No. 89CA0995
Trial Court No. 88CR129

PEOPLE v. ROBIN K. AULD

This cause came to be heard on the record on appeal from the District Court of La Plata County, and was argued by counsel, on consideration thereof, it is ordered that the Judgment of said Court is AFFIRMED.

DATE: September 12, 1991 JAMES G. BENWAY
Clerk of Court

By: /s/ _____
Deputy Court Clerk
